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The International Application of the Second Computer Inquiry

Robert M. Frieden*

INTRODUCTION

Data processing and telecommunications technologies and services are rapidly merging into what is called "communications,"¹ or "teleinformatics."² The merger of two previously discrete technologies has created a domestic regulatory dilemma for the Federal Communications Commission (FCC) as it struggles to devise a scheme to regulate communications common carriage while leaving data processing subject only to marketplace competition.³ International confusion also has resulted because these new services defy functional classification, and no universal definitions and standards have been established to coordinate the manner in which they will be provided among nations. Notwithstanding the problem of classification, the FCC has sought to define these services loosely in terms of existing regulated telecommunications or unregulated data processing services.

The FCC's attempt to establish a framework for existing technology merely assumes that these hybrid services constitute a simple extension of what is currently available. At some point, however, technological innovation renders a telecommunications service so much like an information processing service that the established semantic dichotomy breaks down. While it would be imprudent to burden vendors of data processing services with pervasive common carrier regulation, some mechanism is necessary to safeguard the economic well-being of common carriers and the viability of their essential services that will now be subject to greater competition. To varying degrees, nations acknowledge this problem and allow commercial, non-communications enterprises to provide such services under a

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modified type of government oversight. United States and foreign regulatory agencies,⁴ however, employ various definitions, standards, and classifications to maintain a sharp dichotomy.

Ultimately, the conversion of all telecommunications transmission media into a digital (electronic pulses) format from the present analog (waveform) mode will foster an even greater consolidation of data processing and telecommunications services. Emerging Integrated Services Digital Network (ISDN)⁵ will not distinguish between voice, record, facsimile, data, or information transmission or manipulation. Until that time when data processing and telecommunications merge completely, however, problems in regulation and operation will abound.

This article chronicles the FCC's attempt to confront the confluence of telecommunications and data processing technologies by fashioning a regulatory scheme designed primarily for the United States. The Commission has chosen to apply this scheme, without significant qualification, internationally. Given the different objectives and structure of United States and foreign communications industries, the FCC's system cannot be transplanted abroad without prior consultation and substantial modification. After reviewing the international problems created by the Commission's application abroad of its newly developed scheme, this article concludes with recommendations for resolving these conflicts that currently threaten the well-being of carriers, customers, and international comity.

THE FCC COMPUTER INQUIRIES: MAPPING THE COMMUNICATIONS/DATA PROCESSING TERRAIN

In the United States, the merger of communications and data processing technologies has posed a threat to an existing regulatory system of established jurisdictional limits, geared to defining the accessible markets for certain carriers.⁶ In a general sense, communications services have been the subject of regulation while data processing has not. Because communications common carriers are now free to enter data processing markets,⁷ it was essential that the FCC establish structural safeguards "designed to prevent common carriers from unfairly burdening their regulated communications services with costs properly attributable to unregulated data processing services."⁸ In addition, because the structure of the American communications industry is such that one enterprise may be engaged in both communications service and data processing, the FCC had to define criteria for categorizing particular services rather than regulating by industry; regulation would apply only to communications service, with data processing, even if provided by a communications carrier, generally free from governmental oversight. In so doing, the Commission sought to

freeze technological evolution in time so that it could craft semantic categories that supposedly would define markets in perpetuity. Depending upon its definition as data processing or telecommunications, a service and the enterprises providing it could be subject to two vastly different operating rules and economic safeguards.

The FCC's Preliminary Classification of Combined Services

In 1966, the FCC began to develop comprehensive criteria to categorize the new combined services.⁹ Concentrating on how computerization was then employed, the FCC first left unregulated data processing when used "for operations which include, *inter alia*, the functions of storing, retrieving, sorting, merging, and calculating data according to programmed instructions."¹⁰ Computer-assisted telecommunications, "the transmission of messages between two or more points via communications facilities where the message remains unaltered,"¹¹ would, on the other hand, be regulated.

Soon realizing that a strict data processing/communications dichotomy would not be feasible in view of technological advances, the Commission acknowledged the need to specify hybrid grey areas.¹² These additional definitions would still allegedly foster "maximum separation"¹³ between those services which communications common carriers could provide exclusively and those services which any data processing enterprise could offer free of regulation, having first acquired the necessary transmission capacity pursuant to tariff from a regulated carrier. The FCC subsequently found that the three subclassifications of data processing, and two subcategories of computer-assisted communications it had specified, could not adequately classify the myriad of services that could now be jointly performed by a central computer facility and terminals distributed throughout a complete information processing and transmission network.¹⁴

Despite rising doubt that "[t]he confluence of data processing and communications may be such . . . that it is no longer practical or possible, from a regulatory point of view, to classify these activities . . .,"¹⁵ the Commission would not forsake a regulatory regime ostensibly based on functional criteria and bound by the then existing state of technology. In so doing, however, the FCC recognized that technological advances had already rendered an absolute data processing/communications dichotomy impossible. Such a dichotomy could perhaps be applied in foreign nations where one carrier merely provided all communications services, but not in the United States, where private enterprises were engaged in both services.

The Commission subsequently opted to use broad service categories that established a fundamental line of demarcation rather than considering the specific nature of what was involved in a particular service. Thus, "voice service"¹⁶ and "basic non-voice" service¹⁷ could be provided by

communications entities without restriction. "Enhanced non-voice" service,¹⁸ on the other hand, was the term used to describe the new data processing category that combined the active use of computerization for data manipulation with telecommunications. Services falling within this category would be restricted when performed by a communications common carrier. Again the Commission's stated purpose was to minimize the need for it to make ad-hoc service evaluations or for the service provider to package an offering in such a way as to fit within a preferred category. The Commission attempted to establish a regulatory structure that distinguished between communications and data processing services offerings without affecting the manner in which computerization was employed in either category.¹⁹ This definitional scheme was necessary because the structure of the communication and data processing industries in the United States obligated regulatory intervention to ensure that carriers providing communications services could also enter data processing markets without securing subsidies and artificial advantages accrued from their communications ratepayers.²⁰

The Second Computer Inquiry Establishes A Basic/Enhanced Services Dichotomy

The FCC concluded its attempt at line drawing in 1980, when it decided on a division between "basic transmission services" and "enhanced services."²¹ Under this final scheme, "the Commission continued to require common carriers to provide basic transmission services under tariff on an equal basis to all customers."²²

The Commission defined a "basic transmission service" as "one that is limited to the common carrier offering of transmission capacity for the movement of information."²³ A carrier "essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."²⁴ Hence, communications common carriage of basic transmission service is merely the offering of a communications path that can be used to send either voice, data, or video signals, depending upon the nature of the transmission line.²⁵

"Enhanced services" were defined as transmissions over a telecommunications network combined with computer processing that "act on the content, code, protocol and other aspects of the subscriber's information."²⁶ This category covered services that use computerization to offer "additional, different, or restructured information . . . provided [to] the subscriber through various processing applications performed on the transmitted information,"²⁷ or that use computers to process or store information.²⁸

The Commission found that enhanced services and the terminal devices customers attached to the communications network, customer premises equipment (CPE), were not within the scope of its common carrier jurisdiction.²⁹ It did find however, that certain aspects of these services and devices were within its ancillary jurisdiction.³⁰ Such jurisdiction was appropriate when the Commission needed to effect its overall public interest goals while also limiting its common carrier jurisdiction and freeing data processing from regulatory oversight. Accordingly, the FCC refrained from regulating enhanced services, with the exception of requiring AT&T to provide such service via a fully separate subsidiary because it alone possessed "sufficient market power to engage in effective anticompetitive activity on a national scale and . . . [held] sufficient resources to enter the competitive [enhanced services & CPE] market[s] through a separate subsidiary."³¹ This order was necessary "to prevent AT&T from burdening its basic transmission service customers with part of the cost of providing competitive enhanced services . . . based on AT&T's market power and its ability [without segregation] to undercut its competitive offerings with profits from its monopoly services."³²

The Commission also distinguished between the provision of basic transmission services and the offering of CPE that traditionally had been "bundled" together. Rate regulation would continue over the provision of transmission service, but CPE was to be sold separately in a burgeoning, unregulated and competitive marketplace.³³

The FCC's revised definitions substantially clarified its regulatory purview. In rejecting its prior definitional scheme, which attempted to classify various types of enhanced information processing services, the Commission opted for looser line drawing to distinguish between communications and information processing while recognizing that computerization could serve purely communications objectives.³⁴ Under the new scheme, communications carriers employing computerization to "facilitate economical, reliable movement of information [that] does not alter the nature of the basic service" could provide the service directly.³⁵ No separate subsidiary was required when computer memory and storage functions were used solely to expedite the switching and routing of an "analog or digital transmission of voice, data, video, etc., information signals through a communications path."³⁶ When "additional, different, or restructured information . . . through various processing applications performed on the transmitted information" were involved, however, the service would be classified as enhanced and would have to be provided through AT&T's separate subsidiary³⁷ and by other carriers using separate books of account to allocate costs properly.³⁸ While the Commission faced challenges to its scheme on jurisdictional grounds and on the adequacy of its basic/enhanced services dichotomy, given the existence of services³⁹ and equipment⁴⁰ which defy

easy compartmentalization, it had successfully devised a domestic regulatory framework. A far more difficult task, though, has been the application of this framework to the international telecommunications/data processing marketplace.

THE INTERNATIONAL TELECOMMUNICATIONS/DATA PROCESSING MARKETPLACE

The intrinsic nature of international telecommunications and data processing services precludes a simple extension of the FCC's *Second Computer Inquiry*. For the most part, these two service categories have been provided internationally by mutually exclusive enterprises. Unlike the fully competitive marketplace that the FCC has sought to promote in the United States, most foreign systems consist of a limited number of telecommunications entities operating under a government franchise or as government monopolies. These foreign postal, telegraph, and telephone (PTT) entities provide a complete set of communications services and have adopted rules and policies that establish service, access, and pricing limitations in part to ensure reliable, affordable, and universally available services at home. Because these PTTs must serve a nation's total communications needs, often without the freedom to enter other markets, they must temper their zeal to exploit technological advances, which could prove profitable with an absolute obligation to maintain the availability of some services, such as postal operations, that are intentionally priced at less than cost. Other services, such as international telex and telephone services, must be priced far above cost to generate a surplus to cross-subsidize the underpriced services.

Unilateral United States efforts to foster robust price and service competition thus face tremendous barriers, not only because most foreign nations have but one telecommunications service provider, but also because prices closely paralleling costs among discrete service categories may undermine the PTTs' ability to promote social and political policies through cross-subsidization.⁴¹

Conflicts Between Foreign PTT Service Obligations And FCC Marketplace Goals

Foreign PTTs are leery of competition, service diversity, and general structural changes because the need to cross-subsidize services promotes maintenance of the *status quo*. While United States carriers and equipment suppliers can tolerate cuts in profit margins to meet competitive demands and can experiment with technological innovations or enter new non-

communications markets, the PTTs must avoid conferring tangible financial benefits on one class of consumers if other users cannot afford to bear higher costs and have no other options available.

Because good relations among nations require compromise and coordination, United States firms, accustomed to operating in a more competitive domestic environment, must nevertheless comply with PTT-imposed restrictions that constitute essentially anticompetitive practices and policies. Accordingly, the terms, conditions, and prices for some international services to United States consumers are likely to be less attractive than those that could be established if foreign PTTs operated competitively.⁴² Indeed, the opportunity for United States carriers and service providers to compete aggressively is constrained by PTT-imposed limitations on which carriers can gain access to a foreign nation's domestic network and what services can be provided.⁴³

Given the need for operational and pricing stability, PTTs feel threatened by an unregulated, enhanced services marketplace, and by the recent proliferation of products and services caused, for example, by the FCC's deregulation of CPE. Enhanced service providers have every incentive to engineer the cheapest route between the United States and foreign destinations. Because United States and foreign carriers have opted to discount heavily large volume, private line services, the majority of new enhanced services providers will seek to use bulk private lines and avoid higher priced usage-sensitive international public switched networks designed for the carriage of individual customers' telex and telephone calls.

Resale And Shared Use Of Private Lines For Enhanced Or Basic Services

Any major shift toward greater use of private lines threatens to upset the pricing policies and, in turn, the profitability of most PTTs that rely on their public switched network as the fundamental telecommunications pipeline and their primary source of revenues. Consequently, United States entrepreneurs threaten to jeopardize this balance when they acquire bulk private line packages, designed and tariffed for use by single, large-volume users, and resell individual circuits to a large number of small-volume users. This trend results in an international service dichotomy:

- (1) The growing use of highly advanced, efficient, data compatible, enhanced service networks carried over private-lines, presumed by the PTT to serve only a small set of very large users, e.g., the U.S. Department of Defense, major banks, aviation reservation systems, etc., and
- (2) The lowered use of the traditional international public switched

network that will be saddled with small users who may be financially penalized from the concomitant drop in gross PTT revenues resulting from greater use of private lines.

The FCC has hastened the emergence of this dichotomy through the international application of the *Second Computer Inquiry* and by initiating a review of American and foreign restrictions on the resale and shared use of international transmission capacity.⁴⁴ Aiming to eliminate another service barrier to robust competition, which already has accrued domestic benefits, the Commission has injected more international operational complexity and threatened the fragile legitimacy of American international enhanced service providers. If the Commission leads an international crusade to foster private line resale, it may disrupt the ability of carriers to maintain discrete submarkets and to discriminate between customers on the basis of usage volumes. While this will generate real financial and service benefits to some users, the maintenance of rate discrimination, which may not even have efficiency or cost justifications, preserves a ubiquitous high-volume public switched international network.

Any policy or pricing initiative, which affords small retail users cheaper options entailing a departure from the public network, jeopardizes PTT objectives (e.g., subsidization of postal services from noncompetitive telephone and telex rates, service stability, and operational control). Resale authority offers enhanced service vendors and consumers "the opportunity to select more accurately the lowest priced service that adequately meets communications needs."⁴⁵ "[B]y purchasing discounted bulk . . . services . . . and reselling them to smaller users . . . arbitrageurs . . . create pressure on the underlying carrier to set rates for the discounted service which fully recover the costs of providing that service."⁴⁶ However, the authorization of new American customer options and alternatives to conventional access to foreign locales without foreign consent is perceived by conventional American carriers as unfair competition and by the PTTs as a threat to their operational sovereignty, pricing policies, and financial well-being.

Existing American carriers have retaliated by refusing to convey or lease capacity to international resellers without FCC certification that the resellers constitute authorized common carriers. However, the refusal to lease capacity conflicts with the *Second Computer Inquiry* policy that contemplates ease in acquiring tariffed transmission capacity when used to devise an unregulated enhanced service.⁴⁷ Carriers owning transmission capacity likewise opposed reseller certification by the FCC on grounds that resale activity would violate their existing tariff provisions, which prohibit resale of international lines even if the process is an essential element to the provision of an enhanced service.

On the foreign side, PTTs and their representative associations have

used the various international telecommunications policymaking bodies⁴⁸ as fora to air their objections to private line resale.⁴⁹ With greater frequency, several PTTs threaten the elimination of the private line circuitry option if resale (basic or enhanced) activity proliferates further. Such retaliation would drastically raise telecommunications expenses to large users and eliminate the flexibility necessary to configure lines for specialized information processing applications.⁵⁰

While FCC elimination of American-based international resale and shared use restrictions may free American enhanced service providers from any regulatory oversight and afford them a greater opportunity to acquire cheaper access to foreign locales, the Commission must not jeopardize the positive working rapport that American carriers and government agencies must maintain with their foreign counterparts. It is the potential for financial injury resulting from the proliferation of services and customers' departure from the public switched network that prompts PTTs to limit the set of alternative means for access to a foreign nation's local distribution facilities. The FCC cannot unilaterally foist upon its foreign counterparts a new industrial and service structure without first assessing which set of users and carriers stand to gain or lose from a related international resale policy and the unqualified application of the *Second Computer Inquiry*. If a foreign PTT refuses to confer an operating agreement with a new United States enhanced services provider because the PTT does not wish to permit such a "resale" service and it intends instead to coordinate the provision of new (enhanced) services only with its existing correspondents, then the FCC's campaign for open entry and marketplace competition will undoubtedly be frustrated.

Unsanctioned enhanced services can, however, be carried unobtrusively through PTT domestic circuits as if they were legitimate telecommunications traffic. An enhanced service provider can, for example, continue to operate without official sanction because its services can ride "piggyback" on the lines of a carrier with operational authority.⁵¹ Such action would, of course, subvert existing operational ground rules.⁵² While the PTT is not likely to monitor the lines of its foreign correspondents, it will notice revenue attenuation if such interlopers succeed in diverting enough conventional (basic services) traffic from the public switched network. Such unsanctioned resale and enhanced services make the possibility for eased restrictions to foreign locales even less likely.

Confusion Resulting from the Absence of Universal Service Definitions

Another problem lies in the disparity between American and foreign definition of services. For example, a United States enhanced service that

must be provided on an unregulated basis may merely constitute a new PTT service option. Generally, PTTs and international telecommunications fora assume that a new computerized service, which can be linked to telecommunications lines, constitutes an extension of the already available services. Because a PTT provides all telecommunications (basic services), it will incorporate any computerized innovation, including enhanced services, as a communications option if additional revenues will accrue. For example, PTTs and international fora are currently working on a way to incorporate services that enable terminals operating at incompatible transmission speeds, codes, or protocols to communicate on an "on-line" and "real time" basis.

Notwithstanding the FCC's goal of promoting the capacity of enhanced service providers to tailor their offerings to the particular needs of an individual customer in an unregulated environment, the PTT and international fora strive to establish worldwide standards and rules that institutionalize as "communications" those enhanced services which most closely parallel existing telecommunications offerings: *e.g.*, "teletext," a higher speed telex service that incorporates a variety of data manipulation, conversion and "store-and-forward" service options.⁵³ Other more exotic and customer-specific enhanced services are likely to be deemed data processing which will not be provided by the PTT or recognized as a telecommunications service in international fora, even though United States communications common carriers will provide these services along with their other conventionally regulated, basic offerings.⁵⁴

FCC EXTENSION OF THE SECOND COMPUTER INQUIRY TO INTERNATIONAL SERVICES

In deciding whether to apply the semantic distinctions of the *Second Computer Inquiry* to the international telecommunications and data processing marketplace, the FCC was presented with the Hobson's choice of: (1) preserving the philosophical and categorical integrity of a major domestic-oriented policy pronouncement despite international confusion and operational problems, or (2) qualifying its international application, which would cause confusion and operational problems for United States carriers, many of which serve both domestic and international markets, and thereby undercutting Commission efforts to limit its regulatory jurisdiction over information processing services. The Commission opted to maintain a uniform limit to its common carrier jurisdiction.⁵⁵ In so doing, it freed international enhanced service vendors from traditional common carrier regulation⁵⁶ and, in effect, authorized the *de facto* resale of international lines.

The FCC first addressed the international application of the *Second Computer Inquiry* when it reviewed the applications of two United States carriers for authorization, pursuant to Section 214 of the Communications Act,⁵⁷ to extend their domestic enhanced packet-switched data communications networks internationally.⁵⁸ While packet switching does not by itself constitute an enhanced service,⁵⁹ as the technology involved can be used solely to provide a more efficient method of message switching and routing,⁶⁰ the applications of GTE-Telenet Communications Corp. (Telenet) and Tymnet, Inc. (Tymnet) clearly involved "an existing enhanced service as currently constituted."⁶¹

United States Definitions Fail to Win Universal Acceptance

The principal problem raised by the two applications was, however, the international ramifications of applying the *Second Computer Inquiry* abroad rather than an assessment of whether the Telenet and Tymnet services fell within the enhanced services definition.⁶² Telenet and Tymnet actively sought Commission Section 214 approval as international common carriers because of their perception that a Commission "refusal to certify international enhanced service providers would prevent [such] firms . . . from negotiating directly with foreign administrations and thereby [would] frustrate Commission policies of encouraging new entrants. . . ."⁶³ The two enterprises had, however, already acquired at least one foreign operating agreement prior to Commission action.

The attractiveness of such a status probably stemmed more from the firms' perception that Commission approval was necessary to protect the trouble-free right to lease transmission capacity from existing United States international carriers rather than the actual need to acquire suitable credentials to negotiate operating agreements with foreign PTTs. Conceivably, operating United States international carriers could foreclose the most attractive avenues for an enhanced service market by asserting that their obligation to lease bulk transmission capacity applies only to a select group of "authorized users"⁶⁴ and common carriers. Without an official seal of approval, unregulated international enhanced service providers could be classified collectively in the dubious basic transmission capacity reseller category,⁶⁵ irrespective of whether they provide enhanced,⁶⁶ computerized non-common carrier services or conventional basic services while evading traditional regulatory oversight. Most United States international carriers impose tariff restrictions that prohibit the resale of their leased lines, which is exactly what a non-common carrier enhanced service provider must do to market its unregulated services. The success of any resale tariff prohibition depends, however, on the willingness and capacity

of United States international basic service carriers to scrutinize requests for lines and to monitor their use.

The FCC attempted to skirt the question of resale by concluding that "it would be inappropriate for us to address this issue in the current proceeding."⁶⁷ Throughout the *Second Computer Inquiry*, the Commission attempted to develop uniform basic and enhanced service definitions and to foster a "generic finding under Title II of the [Communications] Act."⁶⁸ Having "delineated those services which are outside the scope of Title II,"⁶⁹ the Commission concluded that without exception all "enhanced services are not common carrier services."⁷⁰ Accordingly, "[n]o differentiation was [to be] made among various enhanced services in determining the parameters of Title II regulation,"⁷¹ even if some enhanced service vendors might find it difficult to acquire necessary transmission capacity.

Not only did the FCC avoid considering the international ramifications of a completely unregulated set of enhanced services, it emphatically declined to assert jurisdiction over any non-communications services even if some type of supervision was necessary to legitimate them in the eyes of foreign PTTs. The Commission in effect announced that any enhanced service vendor that could secure transmission capacity, notwithstanding carrier tariff prohibitions on line resale, was free to proceed without restriction. Whether the transaction between the enhanced service vendor and the end-user constitutes line resale in terms of FCC policy⁷² is now academic because a new class of legitimate and unregulated enhanced services vendors has been identified. The Commission's regulatory forbearance obligates it to refrain in the future from assessing whether value-enhancing computerization constitutes a truly enhanced service or the functional equivalent to an existing basic service. Because some users may be indifferent as between basic and enhanced service options, as long as rates are competitive, new enhanced service vendors will be competing with existing basic service carriers for some of the same customers. Thus the enhanced service enterprise that has packaged its offerings in such a manner as to evade FCC regulations may nonetheless be a competitor of conventional carriers and PTTs.

The FCC has determined that the entire class of enhanced service providers falls outside its jurisdiction, notwithstanding their likely penetration of the basic services market and the Commission's express reservation of judgment as to whether international resale should be left completely unregulated. Enhanced service vendors can infiltrate supposedly limited United States and foreign markets because of the similarity between some enhanced services and conventional offerings and the inadequacy of line monitoring. For example, the proliferation of telex-type resellers, many of which operate without any FCC certification or approval,⁷³ resulted from poor private line monitoring by underlying carriers. Furthermore, AT&T,

which predominately provides the usage sensitive international public switched telephone network, welcomes resale actively used for international record services because it stimulates usage, and until quite recently, AT&T had been prohibited from providing non-voice services.⁷⁴ Consequently, the creation of an unfettered international enhanced service marketplace threatens many institutionalized and protected service categories.⁷⁵

FCC Promotion Of An Unregulated Enhanced Services Marketplace Creates International Problems

Increases in the number of vendors and services, even if strictly limited to enhanced services, threaten the PTT's control over services and revenues. This threat will arouse vigorous foreign challenges to the FCC's unilateral edicts, many of which could also be detrimental to American carriers and customers.

The resolution to these international problems does not lie in qualifying or redefining basic and enhanced services. Rather, it lies in devising a mechanism whereby enterprises proposing to provide truly enhanced services may secure the right to acquire transmission capacity from United States international common carriers and may obtain proper credentials to negotiate operating agreements with foreign carriers. Without some type of official certification, enhanced service providers of all nationalities may cause substantial confusion.

Telenet and Tymnet correctly asserted that unsanctioned and unregulated American providers of enhanced services would find few legitimate service opportunities in foreign locales, particularly if they seek to establish a presence with resale services that are comparable to basic international service options. The solution lies in working with PTTs to devise a universal system for identifying and accepting enhanced services that will augment and complement existing international communications services. The successful integration of new United States-sponsored enhanced services will not occur until such offerings can raise additional revenues for PTTs rather than reduce present revenues by diverting traffic from conventional modes of message transmission.

The pseudo-enhanced services vendors, operating without United States or foreign sanction in a manner that exploits private line resale and diverts traffic from basic service routes, jeopardizes the acceptability of other innovative enhanced services. Because the United States has failed to devise a system that can distinguish between the two, various PTTs have announced the possibility of restricting the availability of private line access to all American carriers and customers. Moreover, the opportunity for an expanded number of foreign operating agreements with new United

States carriers and basic or enhanced service resellers may be foreclosed if the PTTs perceive greater ease and profitability in conferring no more than one operating agreement for new and existing services.⁷⁶

The *Second Computer Inquiry* program for unregulated international enhanced services may also have a deleterious effect in the United States as well. Despite serious efforts within the United States to enforce reciprocity among nations so that foreign carriers will not be permitted to operate in the United States unless American carriers are granted similar rights abroad,⁷⁷ an unregulated enhanced services environment may, in effect, permit foreign carriers and enhanced services providers to penetrate the American market without the same restrictions faced by American firms in the foreign locale. Conceivably, a foreign enterprise, by packaging its offerings as enhanced services, could set up shop in the United States without seeking any sort of FCC authorization. Once in place, the foreign entity's services, whether of the truly enhanced variety or not, would doubtless compete to some extent with existing United States international carriers' services. Moreover, to the extent that the foreign enhanced services entity has ties at home with the national PTT, arrangements might be made to route international traffic between the United States and the home country exclusively through the foreign entity. Perhaps, also, these international switched services could be offered on more attractive terms than is possible for the American carriers.⁷⁸

The foreign enhanced services provider, in conjunction with its corporate alter ego or PTT correspondent at home, would thus be able to offer a complete set of end-to-end services between the United States and abroad free from any FCC regulation. Given the regulations and restrictions under which American international carriers must operate and the ability of a foreign entity to make exclusive arrangements with its home country counterparts, it is quite likely that traffic could be substantially diverted from United States carriers and enhanced service providers. In its quest to promote an "improved communications system with more choices for consumers, more diverse service offerings, and lower rates,"⁷⁹ the FCC thus may have injured its primary beneficiaries.

PROPOSED MODIFICATIONS OF THE SECOND COMPUTER INQUIRY TO ACCOMODATE THE INTERNATIONAL MARKETPLACE

In view of the substantial problems discussed earlier, the FCC must establish some oversight and control of the international enhanced services market apart from its traditional Title II common carrier jurisdiction. To a great extent, both a jurisdictional basis and an adequate system for

oversight already exist. The Commission has retained two jurisdictional ties to the enhanced services market. While the FCC expressly refrained from applying a comprehensive regulatory scheme to enhanced services, it held (1) that it had ancillary jurisdiction⁸⁰ under Title I of the Communications Act⁸¹ and (2) that Title II jurisdiction would apply to the manner in which underlying carriers supplied transmission capacity to providers of enhanced services. Without abandoning its reliance on marketplace forces,⁸² the Commission can give special attention to particular aspects of the international enhanced services market. Indeed, the Commission has already noted that AT&T's provision of such services required special regulatory action by ordering the formation of a completely separate subsidiary.⁸³

Ancillary Jurisdiction as a Vehicle for Necessary Oversight

The assertion of limited ancillary jurisdiction over international enhanced services, within the context of Title I of the Communications Act, would constitute a legitimate application of FCC oversight, but "only insofar as such offerings affect . . . traditional Title II concerns."⁸⁴ In upholding the Commission's *Second Computer Inquiry* scheme, the D.C. Circuit Court of Appeals recognized the need for ancillary jurisdiction:

Once the difficulty of isolating activities subject to Title II regulation outweighs the benefits to be gained by that regulation, then the Commission is justified in conserving its energies for more efficacious undertakings, at least when it establishes an alternative regulatory scheme under its ancillary jurisdiction.⁸⁵

In its *Second Computer Inquiry* decision, the FCC realized that its promotion of competition in communications markets might warrant some degree of Commission oversight of new markets that contain an identifiable telecommunications component, even though they do not warrant the full application of Title II regulation.⁸⁶ The Commission stated:

We seek to make clear on reconsideration that it is not our intent in this proceeding to assert that any service or activity in which communications is a component is within the subject matter jurisdiction of Section 2(a) of [Title I] of the Communications Act. On the other hand, we do not here exclude *a priori* all enhanced services from within the scope of Section 2(a) of the Act either.⁸⁷

United States courts have tended to avoid second guessing the FCC's wisdom in asserting or denying jurisdiction.⁸⁸ In approving the Commission's *First Computer Inquiry* and its limited assertion of jurisdiction over

common carrier provision of data processing services, the Second Circuit Court of Appeals held that:

even absent explicit reference in the statute [*i.e.*, the Communications Act], the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications including that of computer services where such activity may substantially affect the efficient provision of reasonably priced communications services.⁸⁹

Without permitting "unfettered discretion to regulate or not regulate common carrier services," courts will defer to a regulatory agency's "alternative regulatory scheme [that will] more effectively further the goals of the Act."⁹⁰

In *CBS, Inc. v. FCC*,⁹¹ the Supreme Court affirmed FCC jurisdiction over the three major television networks to facilitate the implementation of congressional intent to create a limited right of reasonable access to the broadcast media by legally qualified candidates seeking federal elective office under Section 312(a)(7) of the Communications Act.⁹² The networks were held to be bound directly by the Communications Act's mandate, rather than solely through the indirect regulation of their owned and operated stations, because the Commission and the courts feared that Section 312(a)(7) would lose much of its intended strength if candidates had to assemble their own coverage on an individual, station-by-station basis. The Circuit Court of Appeals for the District of Columbia stated:

Even if Section 312(a)(7) by itself does not afford the Commission power to mandate reasonable network access, such jurisdiction is "reasonably ancillary" to the effective enforcement of the individual licensee's Section 312(a)(7) obligations and hence, within the Commission's statutory authority.⁹³

Neither the petitioners nor the Supreme Court, on certiorari, questioned the FCC's application of "reasonably ancillary" jurisdiction over the national networks as necessary for effective enforcement of the obligations of individual broadcast licensees under section 312(a)(7).⁹⁴

Title II Jurisdiction Over Underlying Carriers

The terms and conditions under which providers of enhanced services can acquire necessary transmission capacity affects their attractiveness in the marketplace. If they are denied the option of leasing private lines, then the need to resort to AT&T's international public switched network will reduce the flexibility, diversity, and cost effectiveness of enhanced ser-

vices. The FCC has already asserted its jurisdiction to compel domestic common carriers to lease publicly available transmission capacity to providers of both basic and enhanced services.⁹⁵ Logically, then, the FCC can also employ its Title II jurisdiction over United States' international carriers to regulate the basis on which enhanced services providers acquire international transmission lines to foreign locales and their access to United States domestic carrier networks. This assertion of jurisdiction is necessary if the FCC is to identify all providers of enhanced services and to monitor their performance.

Section 205 of the Communications Act⁹⁶ empowers the FCC to determine and prescribe fair and reasonable terms, conditions, and rates for American communication common carriers. Through oversight of the transmission line and the underlying carrier, the Commission can exercise indirect control over unregulated subsidiaries, resellers, and providers of enhanced services.⁹⁷ To be sure, the carrier is, to a great degree, not responsible for the activities of its lessee, and may, as noted earlier, be unable or unwilling to monitor how its lines are being used. The Commission can, however, attempt to require greater scrutiny by licensed carriers of their noncarrier lessees' proposed plans to use transmission lines. The underlying carrier cannot act as a surrogate regulatory agency, but, as an interested intermediary and probable competitor, it can assess the plans of enhanced service vendors to ensure that they do not violate United States or international laws or operational practices.⁹⁸ Up to now, the carrier has had to detect illegal or improper activity and to petition the Commission to order that the practice cease or that the carrier be given the right to terminate service. The FCC should place the burden instead on the vendor of enhanced services to demonstrate that it intends a legitimate use of transmission lines, that will not violate domestic or foreign policies or rules.

With the underlying carrier ordered to play a more active role in evaluating the proposed service, the Commission will have employed a front-line guardian. Any unreasonably self-serving practices by carriers can be remedied by a petition to the FCC from the vendor of enhanced services that has been denied service or subjected to discriminatory treatment. By placing the burden to prove unfair treatment on the vendor of enhanced services, the Commission will have established itself as the proper forum, pursuant to Title II of the Act, to correct improper carrier practices, while securing a degree of oversight and control over the potentially illegal and injurious practices of illegitimate enhanced service providers.

RECOMMENDATIONS FOR RESOLVING INTERNATIONAL CONFLICTS

Until the advent of fully integrated international telecommunication network, United States governmental agencies must assist American non-common carriers in gaining access to foreign markets through active participation in international planning and policy-making fora. Given the FCC's own difficulty in establishing a set of domestic criteria for the regulatory treatment of data processing, the broad extension of this scheme internationally will be delayed as United States and foreign planners struggle over universal definitions, standards, and operational practices and procedures. It is essential that American vendors of enhanced services participate in this process, particularly because their market entry has been perceived as a threat to PTT revenues and sovereignty.⁹⁹

Because United States providers of enhanced service lease communications capacity, which they combine with computerization, their legitimacy has been questioned because of their resemblance to bulk-line capacity resellers.¹⁰⁰ Most truly enhanced services constitute, however, a new set of offerings that do not duplicate existing basic services. They can thus generate additional revenue for the PTT even though the service depends on line leasing or bulk line reconfiguration, arguably a type of resale. Nevertheless, the American entrepreneur, operating without a foreign agreement and providing bogus enhanced services which are nothing more than existing basic services, can cause real harm to the PTT, legitimate American carriers and enhanced service vendors, and foreign relations.

Without undermining the grand policies of the *Second Computer Inquiry* or expanding the scope of its Title II jurisdiction, the FCC must devise a mechanism to identify and supervise the international marketing efforts of legitimate enhanced services enterprises that offer more than basic services and the resale of international leased lines. By distinguishing between vendors of enhanced service and the mere reseller of basic services, the FCC will have signaled to its foreign counterparts that it has taken efforts to identify that subset of potential or existing market entrants that deserve foreign consideration as communications/data processing correspondents.

Under existing ITU conventions and standards, the United States Department of State designates American communications firms as recognized Private Operating Agencies (RPOA),¹⁰¹ affording them the opportunity to participate in various international planning activities sponsored by the ITU through its Consultative Committees. The RPOA status has, in turn, often depended on the prior acquisition of FCC section 214 certification, although there appears to be no ITU or American policy mandating this prerequisite. For example, GTE-Telenet, Inc. had participated in ITU proceedings prior to receiving FCC international common

carrier certification.¹⁰² Hence, a mechanism already exists for FCC and State Department registration of legitimate vendors of enhanced services and notification of foreign counterparts.

The FCC will not appear to have approved the *de facto* international resale and shared use of all international services if, instead of a completely hands-off approach to international enhanced services, it indicates a willingness to lend its "good offices" for the registration of truly enhanced service vendors. Likewise, the FCC and other United States government agencies must resolve to participate in international fora and to embrace a long-term commitment to the smooth and effective introduction of new services. Once the Commission commits itself to ongoing consultation with the State Department to identify the providers of enhanced services who are most willing to play by existing operational rules, then the United States government will be better able to convince the foreign PTTs that the United States approach will not interfere with the PTTs' sole provision of such services on the other end, nor injure PTT sovereignty and financial security.¹⁰³

Although FCC regulation of enhanced services providers affects only the domestic legal status of American entities providing international service, the FCC and other United States governmental agencies must be aware how their edicts affect foreign correspondents and the response such policies will provoke. Consultation benefits both parties, but this obligates the United States government, acting in concert with commercial enterprises, to play a more active role in planning for the future, preparing for international planning conferences, and staffing the United States delegation with experts from various disciplines and constituencies in addition to the various regulatory and administration officials and figureheads.

To secure a major stake in the information age, United States officials must appreciate conflicting foreign philosophies, technical and operational practices, and industrial structures. Given such substantial differences, a regulatory scheme primarily geared for the domestic United States telecommunications and data processing marketplace cannot be summarily announced and unilaterally imposed. Only after an in-depth dialogue with foreign counterparts will the FCC and other United States communications policy-making bodies finally be in a position to modify the *Second Computer Inquiry* and to refine United States policy initiatives to accommodate new technologies and expedite their entry into the international marketplace.

NOTES

¹ "Communications" is a shorthand for information services that fully integrate data processing and telecommunications. See *Domestic Telecommunications Common Carrier Policies, Over-*

sight Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess. 822 (1977)(statement of Anthony G. Oettinger, Director, Program on Information Resources Policy, Harvard University).

² See Ramsey, *Europe Responds to the Challenge of the New Information Technologies: a Teleinformatics Strategy for the 1980's*, 14 CORNELL INT'L L.J. 237 n.1 (1981)(" 'teleinformatics' is derived from 'telematics,' a term intended by the [Member States of the European Communities] to apply to all those services, systems, equipment, and products that are based on the use of electronic information techniques, including telecommunications"); see also Eger, *The Global Phenomenon of Teleinformatics: An Introduction*, 14 CORNELL INT'L L.J. 203, 206 n.12.

³ See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, Notice of Inquiry, 7 F.C.C.2d 11 (1966) [hereinafter cited as *First Computer Inquiry—Notice*], Tentative Decision, 28 F.C.C.2d 291 (1970) [hereinafter cited as *First Computer Inquiry—Tentative Decision*], Final Decision, 28 F.C.C.2d 267 (1970) [hereinafter cited as *First Computer Inquiry—Final Decision*], *aff'd in part sub nom.* GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C.2d 293 (1973); Amendment of Section 64.702 of the Commission's Rules and Regulations, Notice of Inquiry, 61 F.C.C.2d 103 (1976) [hereinafter cited as *Second Computer Inquiry—Notice*], Supplemental Notice of Inquiry, 64 F.C.C.2d 771 (1977) [hereinafter cited as *Second Computer Inquiry—Supplemental Notice*], Tentative Decision, 72 F.C.C.2d 358 (1979) [hereinafter cited as *Second Computer Inquiry—Tentative Decision*], Final Decision, 77 F.C.C.2d 384 (1980) [hereinafter cited as *Second Computer Inquiry—Final Decision*], *on reconsideration*, 84 F.C.C.2d 50 (1980) [hereinafter cited as *Second Computer Inquiry—Reconsideration*], *on further reconsideration*, 88 F.C.C.2d 512 (1981) [hereinafter cited as *Second Computer Inquiry—Further Reconsideration*], *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied* 51 U.S.L.W. 3826 (U.S. May 16, 1983)(Nos. 82-1331, 82-1332); [hereinafter cited as *Second Computer Inquiry—Affirmance*]; see also Frieden, *The Computer Inquiries: Mapping the Communications Information Processing Terrain*, 33 FED. COMM. L.J. 55 (1981).

⁴ In many foreign countries, a government-owned monopoly, or administration operating under a government franchise, provides a consolidated set of domestic and international postal, telegraph, and telephone (PTT) services.

⁵ ISDN is "a public end-to-end digital telecommunications network providing a wide range of [new] user applications . . . [which can] be combined with existing services to use an integrated transport capability at a significantly lower overall cost than it would take for each service to use a separate transport capability." Dorros, *Challenge and Opportunity of the 1980's: The ISDN*, TELEPHONY, Jan. 26, 1981, at 43; Kenedi, *Plotting a Strategy for the Emerging ISDN*, TELEPHONY, June 22, 1981, at 22; cf. Overseas Communications Services, 92 F.C.C. 20-641, 655-57(1982), *partial reconsideration denied*, F.C.C. 83-492 (released Oct. 28, 1983) (eliminating restrictions on that U.S. international carriers can provide voice or data services given digital technologies which foster a transparent pipeline for transmission of information in many formats) [hereinafter cited as OCC].

⁶ In 1964, the FCC authorized joint ownership of overseas cables by AT&T and several International Record Carriers (IRCs), that provide for the transfer of information in written or graphic formats. See American Telephone and Telegraph Co., 37 F.C.C. 1151, 1158-62 (1964)[hereinafter cited as *TAT-4 Policy Statement*], *policy re-examined in Overseas Communications Services*, 84 F.C.C.2d 622 (1980) [hereinafter cited as *TAT-4 Policy Review*], *policy reversed in OCC, supra*, note 5. While the Commission long ago acknowledged that the same transmission line can provide both voice and record services, it had proscribed AT&T entry into record markets "to protect the new and relatively weak IRCs from potentially ruinous competition from the giant AT&T." Western Union Int'l v. FCC, 673 F.2d 539 540-41 (D.C. Cir. 1982) (affirming FCC policy permitting subscribers use of international telephone lines to secure record services on a secondary basis without AT&T assistance). The Commission eliminated

the TAT-4 dichotomy in late 1982 because "full market entry by AT&T and the IRCs is reasonable and will serve beneficial purposes." OCC, *supra* note 6, at ¶53. See generally STAFF OF SUBCOMM. ON TELECOMMUNICATIONS CONSUMER PROTECTION AND FINANCE OF HOUSE COMM. ON ENERGY AND COMMERCE, 97TH CONG., 1ST SESS., TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 135-139 (Comm. Print 1981).

⁷ In 1956 an antitrust suit brought by the U.S. Department of Justice against AT&T and Western Electric, its equipment manufacturing subsidiary, was settled by a consent decree. See *United States v. Western Electric Co.*, CA No. 17-49, 1956 Trade Cas. ¶68,246 (CCH)(D.N.J. 1956). Section V of the 1956 Consent Decree prohibited AT&T and all of its subsidiaries, except Western Electric, from "the furnishing of common carrier communications services," defined by section II(i) as "communications services and facilities . . . , the charges for which are subject to public regulations under the Communications Act of 1934 . . ." *Id.*

AT&T has been relieved of the prohibition on noncommunications market entry in the settlement of a 1974 antitrust suit brought by the U.S. Department of Justice. See *United States v. American Telephone and Telegraph Co.*, CA No. 74-1698 (D.D.C. 1982)(modification of the 1956 Consent Decree), reprinted in 47 Fed. Reg. 4166, *judicial public interest review sub nom.* *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* *Maryland v. United States*, 103 S. Ct. 1240 (1983). In agreeing to divest itself of ownership and control of its Bell Operating Companies, which provide local and interstate services, AT&T was permitted to enter most information processing and other noncommunications markets. The *Second Computer Inquiry* requires the establishment of a separate, non-common carrier subsidiary for the provision of these services. See *Second Computer Inquiry—Final Decision*, 77 F.C.C.2d at 469.

⁸ *Second Computer Inquiry—Affirmance*, 693 F.2d at 203.

⁹ See *First Computer Inquiry—Notice*, 61 F.C.C.2d 103.

¹⁰ *First Computer Inquiry—Final Decision*, 28 F.C.C.2d at 287.

¹¹ *Id.* (codified at 47 C.F.R. § 64.702(a) (1974)).

¹² In the *First Computer Inquiry*, the Commission acknowledged the need to consider "the facts surrounding a package offering with a view toward determining the primary thrust of the service offered." *First Computer Inquiry - Tentative Decision*, 28 F.C.C.2d at 305. A looser hybrid categorization presumably could fit a myriad of services into two classifications by considering whether the message transmission or data processing aspect is "an incidental feature of a package offering that is primarily data processing," or "oriented essentially to satisfy the communications or message switching requirements of the subscriber." *Id.* In the *Second Computer Inquiry*, the FCC considered the idea of specifying data processing and communications categories. The Commission defined data processing as follows:

Arithmetic processing—general commercial accounting, payroll, inventory control, banking, point of sale processing and similar tasks.

Word processing—a rapidly developing application resulting from the advances in mass memory technology and word processing software.

Process control—the increased reliability and availability of computers is leading to an expansion of applications where a computer is used to monitor and control some process which is occurring continuously, such as a nuclear power generating station.

Second Computer Inquiry—Notice, 61 F.C.C.2d at 109. The Commission also defined several communications terms as follows:

Network control and routing: applications including pulse format conversion.

Input/output processing: involving the use of a computer capability resident in a carrier network facility for the purpose of making disparate computers and terminals compatible with each other. *Id.* The Commission subsequently realized the futility of using rigid semantical definitions to pigeonhole technology. See *supra* note 10.

¹³ The "[m]aximum separation of activities which are subject to regulation from non-regulated activities involving data processing" was the principal regulatory objective in the Computer Inquiry cases. *First Computer Inquiry—Tentative Decision*, 28 F.C.C.2d at 302; accord *Second Computer Inquiry—Tentative Decision*, 72 F.C.C.2d at 419-20. Some regulation is needed, however, because:

[t]he provision of . . . data processing services by common carriers may give rise to critical problems of unfair competition and cross-subsidy These concerns stem from the potential of common carriers to subsidize their data processing operations with revenues and resources available from their regulated services thereby enabling them to dominate the data processing market by underpricing their data processing service.

First Computer Inquiry—Tentative Decision, 28 F.C.C.2d at 299.

¹⁴ See *Second Computer Inquiry—Supplemental Notice*, 64 F.C.C.2d at 773.

¹⁵ *Second Computer Inquiry—Supplemental Notice*, 64 F.C.C. 2d at 777.

¹⁶ Voice service was defined as "the electronic transmission of the human voice such that one human being can orally converse with another human being." *Second Computer Inquiry—Tentative Decision*, 72 F.C.C.2d at 394.

¹⁷ Basic non-voice service was defined as

the transmission of subscriber inputted information or data where the carrier: (a) electronically converts originating messages to signals which are compatible with a transmission medium, (b) routes these signs through the network to the appropriate destination, (c) maintains signal integrity in the presence of noise and other impairments to transmission, (d) corrects transmission errors, and (e) converts the electrical signals to usable form at the destination. *Id.*

¹⁸ Enhanced non-voice service was defined as "any non-voice service which is more than the 'basic' service, where computer processing applications are used to act on the form, content, code, protocol, etc., of the inputting information." *Id.*

¹⁹ *Id.*

²⁰ "[S]eparation and accounting safeguards are . . . part and parcel of a single regulatory mechanism. At a minimum, a carrier with market power and control over communications facilities essential to the provision of enhanced services could distort the competitive evolution of the enhanced services markets at the expense of the communications ratepayer through cross-subsidization and other anticompetitive behavior." *Second Computer Inquiry—Final Decision*, 77 F.C.C.2d at 464.

²¹ See *id.* at 419.

²² *Second Computer Inquiry—Affirmance*, 693 F.2d at 205.

²³ *Second Computer Inquiry—Final Decision*, 77 F.C.C.2d at 419.

²⁴ *Id.* at 420.

²⁵ *Id.* at 419.

²⁶ *Id.* at 420.

²⁷ *Id.*

²⁸ *Id.* at 420-21.

²⁹ *Id.* at 430.

³⁰ *Id.* at 469.

³¹ *Id.* at 450-52; *Second Computer Inquiry—Reconsideration* 84 F.C.C.2d at 96; see also *Second Computer Inquiry—Affirmance* 693 F.2d at 208.

³² *Second Computer Inquiry—Affirmance*, 693 F.2d at 213.

³³ *Second Computer Inquiry—Final Decision*, 77 F.C.C. 2d at 448.

³⁴ *Id.* at 387.

³⁵ *Id.* at 420.

³⁶ *Id.* at 419.

³⁷ *Id.* at 420, 475. See also *Second Computer Inquiry—Reconsideration*, 84 F.C.C.2d at 72, excluding GTE from the separate subsidiary requirement.

³⁸ *Second Computer Inquiry—Final Decision*, 77 F.C.C.2d at 469, 475.

³⁹ See *American Telephone and Telegraph Co.*, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations, 88 F.C.C.2d 1 (1981) (FCC refused to permit AT&T to provide a class of enhanced voice storage and retrieval services within its basic service communications network, despite AT&T's arguments that such offerings could be provided efficiently only if treated as though they were basic services).

⁴⁰ The definitions set forth in the *First Computer Inquiry* were judicially challenged in 1978 when the FCC declared AT&T's "smart terminal" (the Dataspeed 40/4) a hybrid-communications device, despite a prior Common Carrier Bureau staff decision that it was an unregulated element in a hybrid data processing service. See *American Telephone and Telegraph Co. revisions to tariffs F.C.C. Nos. 260 & 267 Relating to Dataspeed 40*, 62 F.C.C.2d 21, *aff'd sub nom. International Business Machines v. FCC*, 570 F.2d 452 (2d Cir. 1978). This question was rendered moot by the Commission's subsequent decision to deregulate all customer premises equipment (CPE), i.e., "terminal equipment located at a subscriber's premises which is connected with the termination of a carrier's communications channel[s]. . . ." *Second Computer Inquiry—Tentative Decision*, 72 F.C.C.2d at 406 n.75.

⁴¹ Despite a legislative directive to attain financial self-sufficiency, the U.S. Postal Service remains a substantially debt-ridden operation. Unlike its foreign counterparts, it cannot rely on other communications or information services to offset its unprofitable postal operations. Between 1972 and 1978, its accumulated debt exceeded \$3 billion. See *Postal Reorganization Act*, Pub. L. No. 91-375, 84 Stat. 719 (1970), H.R. REP. No. 1104, 91st Cong., 2nd Sess., *reprinted in U.S. CODE CONG. & AD. NEWS* 3649, 3665; see also A. SORKIN, *THE ECONOMICS OF THE POSTAL SYSTEM* 31 (1980) ("If a private firm's balance sheet indicates an excess of liabilities over assets and its income statement shows consistent annual losses, this enterprise is generally considered bankrupt.").

⁴² However, some services which have been tailored to a particular class of user, e.g., large volume, bulk capacity users, might not remain available if unfettered competition fostered a revised pricing policy more closely aligned with cost of service as opposed to demand elasticities.

⁴³ See *Record Carrier Competition Act* Pub. L. No. 97-130, 95 Stat. 1687 (1981). Two of the Act's provisions attempt to secure access to foreign locales for carriers lacking operating agreements with foreign administrations. *Id.* at §§ 222(c)(1)(A)(i) (each record carrier is required "to make available to any other record carrier, upon reasonable request, full interconnection with any facility . . .") and 222(c)(1)(A)(ii) (right established to distribute inbound traffic proportionate to outbound international traffic volumes generated by carriers lacking operating agreements for direct service).

⁴⁴ See *Regulatory Policies Concerning Resale and Shared Use of Common Carrier International Communications Services*, 77 F.C.C.2d 831 (1980)(final rule pending) [hereinafter cited as *International Resale NPRM*].

⁴⁵ *Id.* at 838-39.

⁴⁶ *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167, 168-69 (1980), *on reconsideration*, 86 F.C.C.2d 826 (1981); see also *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services*, 47 F.C.C.2d 644 (1974)(notice of inquiry and proposed rulemaking), 48 F.C.C.2d 1077 (1974), 60 F.C.C.2d 261 (1976), *modified*, 61 F.C.C.2d 70, *further modifications*, 62 F.C.C.2d 588 (1977), *affirmed sub nom. American Telephone and Telegraph Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

⁴⁷ See *Second Computer Inquiry - Final Decision*, 77 F.C.C.2d at 417.

⁴⁸ Operating under the aegis of the United Nations, the International Telecommunica-

tions Union (ITU), and its numerous consultative committees and study groups, serves as the central organization for the determination and promulgation of technical and operational telecommunications standards and policies. The ITU's vast purview runs the gamut from such broad matters as spectrum allocation, orbital slot decision-making, and planning for the implementation of new technologies and services; to the minutiae of frequency allocation and registration, and establishing terms, conditions, and operating practices for presently available services. The ITU's International Telegraph and Telephone Consultative Committee (CCITT) establishes general rules and recommendations which strive to develop consolidated standards, technical protocols, and network access arrangements which ensures network compatibility for new computer-assisted services.

⁴⁹ There is growing concern in international fora that the proliferation of shared use, or resale of "private networks," erodes traffic volumes on public systems, and thereby subverts conventional, worldwide operating procedures. See INTERNATIONAL TELEGRAPH AND TELEPHONE CONSULTATIVE COMMITTEE, GENERAL PRINCIPLES FOR THE LEASE OF INTERNATIONAL (CONTINENTAL OR INTERNATIONAL) CIRCUITS Rec. D.1 (1981). The resulting network abuse and erosion of actual or potential PTT revenues has prompted the consideration of ways to prevent private networks. See J. Eger, TELEINFORMATICS INTRODUCTION 218-22 (1981) (outlines efforts by the CITT to eliminate or restrict the availability of international private lines.)

⁵⁰ See NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, LONG RANGE GOALS IN INTERNATIONAL TELECOMMUNICATION AND INFORMATION: AN OUTLINE FOR UNITED STATES POLICY 146 (1983) ("In part because of the controversy over application of the FCC's Computer II and international resale actions, some overseas administrations may review their policies concerning private leased service. Should this happen, the U.S. business community and the Department of Defense would face major cost increases for international telecommunications, estimated in DOD's case to be as high as 300-700 percent.").

⁵¹ The U.S. enterprise sends its batch of messages to a traffic manager, based in the foreign locale, who serves as an intermediary and "refiles" the message through legitimate channels, either to the addressee in the traffic manager's home country or to neighboring countries via short-haul conventional telex transmissions. In either case, the PTT is deprived of the higher revenues achieved from participation in a conventional long-haul international record service transmission. Instead, the PTT provides a far less lucrative domestic or short-haul international transmission.

⁵² The tariffs of U.S. international record carriers prohibit the shared use or resale of leased private lines. However, the Commission has questioned the legitimacy of these restrictions: "the Commission . . . has never adopted a general policy in favor or against resale of international communications facilities. In fact, there is no legal bar or Commission policy preventing the IRC from voluntarily removing resale restrictions from their tariffs." International Relay, Inc., 77 F.C.C.2d 819, 829, *on reconsideration*, 82 F.C.C.2d 41 (1980); see also Regulatory Policies Concerning Resale and Shared Use of Common Carrier International Communications Services, 77 F.C.C.2d 831, 834-35 (1980): "Inasmuch as tariff regulations limiting resale and shared use may also be artificially preserving price discrimination, unreasonably interfering with innovation in the industry and unduly restricting customers in their use of tariffed offerings, it strikes us that their elimination would be consistent with other recent international policy initiatives."

⁵³ See, e.g., The Western Union Telegraph Co., F.C.C. 83-253 (released June 7, 1983), *reconsideration denied*, F.C.C. 84-225 (released May 22, 1984) (application to provide new high speed telex service, called 'teletext,' between the U.S. and the Federal Republic of Germany).

⁵⁴ Even in the U.S., separate policy making fora addressing separate telecommunications matters have created regulatory conflicts that necessarily qualify prior edicts. In 1981, Congress enacted the Record Carrier Competition Act (RCCA), Pub. L. No. 97-130, 95 Stat. 1678, to foster full interconnection between all domestic and international record carrier networks.

See Frieden, *International Telecommunications and the Federal Communications Commission*, 21 COL. J. TRANSNAT'L L. 423, 466-80 (1983). The Congressional resolve to foster a more competitive record services marketplace nevertheless obligated the FCC to oversee the manner by which American carriers fostered network access, including services which involve message storing, forwarding and conversion from one format into another. The Commission acknowledged that these ancillary services fall within the enhanced services definition under the *Second Computer Inquiry*. See *Interconnection Arrangements Between and Among Domestic and Record Carriers: Store-and-Forward and TWX/Telex Conversion*, CC Docket No. 82-122, FCC 83-84 at para. 44 (released March 16, 1983).

As a result of the routine carrier practice of integrating basic and enhanced services into one offering, the FCC faced a regulatory dilemma. It could insist on the semantic purity of its basic/enhanced services dichotomy or qualify the application of the *Second Computer Inquiry* to accommodate operational realities. Rather than inject unnecessary inconvenience and logistical problems, the FCC "conclude[d] that the RCCA carves out a limited exception to the broader treatment of such issues in Computer II." *Id.* at n.21, see also *id.* at ¶50. Because Congress identified "traditional" record services as subject to FCC oversight, the Commission could maintain necessary common carrier and ratemaking regulatory purview over integral, albeit "enhanced" components of conventional United States international record carrier services without expanding its purview over nonintegrated enhanced offerings like high-speed data services. Only through crafty statutory interpretation was the FCC able to find a plausible resolution to cases where service definitions and regulatory schemes do not jibe with the actual means by which carriers package international telecommunications services.

⁵⁵ See Title II of the Communications Act of 1934, 47 U.S.C. §§ 201-03 (1976) (confers broad jurisdiction on the FCC to regulate interstate and foreign communications common carrier services by wire or radio, including the power to review and prescribe the terms, conditions, and rates for services). See generally J. BONBRIGHT, *PRINCIPLES OF PUBLIC UTILITY RATES* (1969); P. GARFIELD & W. LOVEJOY, *PUBLIC UTILITY ECONOMICS* (1964); A. PRIEST, *PRINCIPLES OF PUBLIC UTILITY REGULATION: THEORY AND APPLICATION* (1969).

⁵⁶ However, the Commission did not relinquish its oversight of enhanced services. See *infra* notes 80-82 and accompanying text.

⁵⁷ 47 U.S.C. § 214(a) (1976) ("[n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require . . . such additional or extended line.").

⁵⁸ Application of the GTE Telenet Communications Corp., File No. I-T-C-81-274, Mimeo No. 2765 (F.C.C. Mar. 15, 1982) (application for authority to extend its packet-switched telecommunications services from the continental U.S. to Europe and elsewhere) [hereinafter cited as *Telenet Authorization*]; Application of Tymnet, Inc., File No. I-T-C-82-210 (F.C.C. Apr. 8, 1982), on review FCC 82-377, Mimeo No. 31855 (F.C.C. Aug. 25, 1982) [hereinafter cited as *Telenet/Tymnet Authorization Review*], on reconsideration, [hereinafter cited as *Telemet/Tymnet Authorization Reconsideration*].

⁵⁹ "[M]essage or packet switching . . . is a store and forward technology that may be employed in providing basic services." *Second Computer Inquiry—Final Decision*, 77 F.C.C.2d at 421, n. 35.

⁶⁰ See *supra* note 37 and accompanying text; see also American Telephone & Telegraph Co., 91 F.C.C.2d 1 (1982) (consideration of AT&T's domestic Bell Packet Switching Service and its ties with American Bell's enhanced services).

⁶¹ *Telenet Authorization*, *supra* note 58, at 4.

⁶² The Commission granted a short-lived authorization until January 1, 1983, pursuant to 47 U.S.C. § 214, see *supra* note 57, because the *Second Computer Inquiry* established a transition

period for the "de-tariffing" of all enhanced services that were being offered prior to December 30, 1980, the effective date of *Second Computer Inquiry—Reconsideration*. If Telenet and Tymnet had not already provided such a service domestically, they would not have acquired even this temporary certification.

⁶³ *Telenet Authorization*, *supra* note 58, at 3. Another new international record service carrier applicant, Consortium Communications International Inc., was informed that it, and similarly situated entities that provide store and forward telex-type services over leased lines, are engaged in common carrier activities for hire and thus fall within the Commission's jurisdiction under Titles I and II of the Act. *ITT World Communications, Inc. v. Consortium Communications International, Inc.*, 76 F.C.C.2d 15 (1980); *accord In re International Relay, Inc.*, 77 F.C.C.2d 819, *modified on reconsideration*, 82 F.C.C. 2d 41 (1980).

Hence, the common carrier label is available to enterprises that opt to provide basic services, even if they use and reconfigure lines leased from other carriers. Many enterprises have failed to secure any FCC sanction even though they duplicate existing services.

⁶⁴ Initially developed to structure satellite capacity conveyancing with one wholesaler (COMSAT) dealing directly with only a few authorized users who then retail services to end users, the concept has been expanded to establish limits to the obligation of common carriers to provide particular types of transmission capacity to non-common carriers. *See In re Authorized Entities and Authorized Users Under the Communications Satellite Act of 1962*, 4 F.C.C.2d 421, 427 (1966), *clarified*, 6 F.C.C.2d 593 (1967) (establishing limited, unique and exceptional instances under which non-carrier can acquire satellite services directly from COMSAT), *policy reviewed, In re Aeronautical Radio, Inc.*, 77 F.C.C.2d 535 (1980), *policy revised in Proposed Modifications of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of the Communications Satellite Corp.*, 90 F.C.C.2d 1394 (1982) (permitting COMSAT to serve end users of satellite services via a separate subsidiary, and to make facilities and services directly available to major non-carrier users, e.g., a world-wide airline reservation service), *vacated and remanded sub. nom.*, *ITT World Comm., Inc. v. FCC*, No. 79-1046, slip op. (D.C. Cir. Jan. 13, 1984) (Comsat cannot retail international satellite services until the FCC acts on other policy initiatives that could enable other international carriers to operate more efficiently by individual ownership of international earth stations and direct cost-based access to INTELSAT satellite capacity).

⁶⁵ "Underlying carriers" own interstate or foreign telecommunications capacity and lease it to end users or resale entities which broker bulk capacity or package computer enhancing services to basic line capacity. They object to the existence of resellers, who can siphon revenue away and "create pressure on the underlying carrier to set rates for the discounted service which do not fully recover the costs of providing that service." *In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167, 169 (1980). The history of regulatory and judicial action mandating domestic resale is replete with cases where underlying carriers have refused to convey capacity or done so only on discriminatory terms and conditions. *See, e.g.*, *Regulatory Policies Concerning Resale and Shared Use of Common Services and Facilities*, 47 F.C.C.2d 644 (1974) (notice of inquiry), 48 F.C.C.2d 261 (1976) (liberal resale policy announced), *modified*, 61 F.C.C.2d 70, *further modifications*, 62 F.C.C.2d 588, (1977), *aff'd sub nom.* *American Telephone and Telegraph v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978).

On the international side, FCC action is limited to the release of a notice of proposed rulemaking. *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier International Communications Services*, 77 F.C.C. 2d 831 (1980). The Commission has indicated that it "has made no findings as to the lawfulness of [underlying carrier] international tariff provisions which restrict the third party use of international facilities." *ITT*, 76 F.C.C.2d at 21. The Commission would place the burden on those carriers to enforce their tariff provisions in the first instance.

⁶⁶ See *supra* note 27 and accompanying text.

⁶⁷ *Second Computer Inquiry—Final Decision*, 77 F.C.C.2d at 489.

⁶⁸ *Telenet/Tymnet Authorization Review*, *supra* note 58, at 7 ¶13.

⁶⁹ *Second Computer Inquiry—Reconsideration*, 84 F.C.C.2d at 90. A preceding section of the opinion discussed Title II's scope, noting that "[t]he basic/enhanced dichotomy is applicable to both domestic and international services provided over common carrier facilities." *Id.* at 53 n.4.

⁷⁰ *Id.* at 89.

⁷¹ *Telenet/Tymnet Authorization Review*, *supra* note 58, at 6 ¶12.

⁷² See generally *supra* note 65. Resale transmission capacity would present the opportunity for arbitrage—"the purchase of a product or service in one market [here, bulk private line transmission capacity] for the purpose of immediate resale in another market." *Regulatory Policies*, 83 F.C.C.2d at 168 n.3. Arbitrage "could help insure that rates are cost-based." *Id.* at 168.

⁷³ See *supra* note 63.

⁷⁴ See *supra* note 52. AT&T recently applied to eliminate restrictions on the shared use or resale of its international message telephone service network. See *Application of AT&T Long Lines*, No. 14078 (F.C.C. Aug. 6, 1982) (to amend FCC Tariff No. 263).

⁷⁵ Enterprises using leased private lines or an international message telephone service network can arrange services so that they constitute cheaper substitutes to underlying carriers' existing array of retail services. Resellers can employ computerization to make message transmission more efficient and therefore less expensive.

The Director of the CCITT has expressed his concern that the Commission's *Second Computer Inquiry* and its decision to consider enhanced services as unregulated offerings constitutes a *de facto* approval of unlimited resale and shared use of international lines. FCC Chairman Mark Fowler responded by stating that underlying carrier tariff provisions governing third-party use of their facilities exist and are "currently enforceable by individual carriers and the Commission." Letter from Mark Fowler, Chairman of the FCC, to Leon Buttz, CCITT Director (October 20, 1982) [hereinafter cited as Letter from Fowler]; cf. *ITT*, 76 F.C.C.2d at 21 (Commission has made no findings as to the lawfulness of international tariff provisions which restrict third-party use of international facilities). The Chairman recognized "[t]hat there may be existing limitations on the use of common carrier facilities that serve to restrict the manner in which . . . [enhanced] services may be provided," but declared that the FCC was not of the mind to qualify its *Second Computer Inquiry* policies to accommodate such international qualifications. Letter from Fowler.

⁷⁶ A number of foreign governments have intimated that they are contemplating the development of sole source or limited source operating agreements with U.S. carriers. In the summer of 1982, the Nordic governments representing Denmark, Finland, Norway, and Sweden contacted the seven major U.S. international service carriers to solicit proposals for the provision of packet-switched services between the U.S. and Scandinavia. State Department and FCC officials expressed concern over the possibility that only one or two U.S. carriers would be afforded the opportunity to participate in new enhanced and advanced basic service markets.

This concern with exclusive dealing led the Western Union Telegraph Co. to indicate publicly that its Teletext agreement with the West German Bundespost did not contemplate that Western Union would serve as the sole source of U.S. originated high speed telex services. Western Union went so far as to state its willingness to accept authorization of its Teletext application with the express proviso that its agreement with the West German Bundespost be considered nonexclusive. See generally 48 TELECOM. REP. 24 (1982).

⁷⁷ See *In re The French Telegraph Cable Co.*, 71 F.C.C.2d 393 (1979). The Commission had adopted a reciprocal national treatment policy. The French PTT refused to allow U.S. carriers

to maintain operating offices in France, and also refused to grant additional operating agreements with U.S. carriers. The FCC retaliated by refusing to permit the expansion of French Cable's gateway operating authority in the U.S. The Commission subsequently approved transfer of ownership in French Cable's U.S. operations to a domestic holding company. See *FTC Communications, Inc.*, 75 F.C.C.2d 15 (1979). Compare *id.* at 29 (dissent by Comm'r Fogarty).

⁷⁸ Concerned with the superior bargaining strength of foreign governments (given their capacity to control the flow of traffic destined for the United States, and to play one U.S. carrier against another to curry the PTTs favor and acquire a larger volume of inbound traffic), the FCC requires all international carriers under its jurisdiction to employ the same monetary figure for purposes of toll revenue sharing. While a carrier may alter the collection rate—the tariff rate charged to its customers—it must employ the same figure all carriers use to determine how much money must be shared between U.S. and foreign correspondents for routes to foreign destinations. The rate is usually divided in half when carriers settle accounts. See *In re Uniform Settlement Rules on Parallel International Communications Routes*, 66 F.C.C.2d 359, 364 (1977), *policy reaff'd*, 84 F.C.C.2d 121, 122 (1981); see also *MacKay Radio and Telegraph Co.*, 2 F.C.C. 592, 599 (1936), *aff'd sub nom. MacKay Radio and Telegraph Co., Inc. v. FCC*, 97 F.2d 641 (D.C. Cir. 1938) ("To rely upon . . . competitors not to make concessions [which would weaken the U.S. carrier or result in higher tariff rates for U.S. customers is] to provide an exceedingly tenuous basis upon which to rest the public interest.")

Foreign carriers and self-proclaimed enhanced services vendors not under FCC jurisdiction are not subject to the uniform accounting rate requirement. Accordingly, they will be free to make lucrative revenue sharing deals which U.S. carriers cannot match. When TRT Telecommunications Corp., a U.S. carrier, acquired authorization to serve the United Kingdom, it was required to submit to the FCC an operating agreement which was "consistent with similar agreements in effect between the [British Post Office, the U.S. international record carrier's foreign correspondent] and other U.S. carriers." *TRT Telecommunications Corp.*, 46 F.C.C.2d 1042, 1056 (1974).

New U.S. common carriers will have to acquire and price international transmission capacity consistent with the uniform rate.

⁷⁹ *American Telephone and Telegraph Co.*, 75 F.C.C. 2d 682, 688 (1980), *aff'd sub nom. Western Union Int'l, Inc. v. FCC*, 673 F.2d 539 (D.C. Cir. 1982).

⁸⁰ The FCC can regulate community antenna television (*i.e.*, cable television) as "adjuncts of the nation's broadcasting system." *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966). Jurisdiction is limited to that which is "reasonably ancillary to the effective performance of the Commission's various responsibilities." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (affirming ancillary jurisdiction over cable television to protect local broadcasting and to further the policies established for broadcast regulation). The Commission can assert or forbear from asserting all or part of its broad regulatory authority over new technologies and services (like cable television) that affect or are linked to existing regulated services. In affirming the *First Computer Inquiry* regulatory regime, the Second Circuit Court of Appeals held:

The rules we are now considering are generically based upon the primary charge of the Commission that its carriers provide efficient and economic service to the public. The burgeoning data processing activities of the common carriers pose, in the view of the Commission, a threat to efficient public communications services at reasonable prices and hence regulation is justified under its broad rulemaking authority. *Second Computer Inquiry—Affirmance*, 693 F.2d at 2.

⁸¹ Title I of the Communications Act grants the FCC general jurisdiction so as "to make available, . . . to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable

charges . . . " 47 U.S.C. § 151 (1976). Enhanced services and CPE also fall within the scope of Title I, which gives the Commission jurisdiction over "all instrumentalities, facilities, apparatus, and services . . . incidental to" interstate and foreign communication by wire or radio. 47 U.S.C. §§ 152, 153(a) &; see also *Second Computer Inquiry—Final Decision*, 77 F.C.C.2d at 450-52; *Second Computer Inquiry—Affirmance*, 693 F.2d at 214.

⁸² See *Second Computer Inquiry—Final Decision*, 77 F.C.C. 2d at 433.

⁸³ See *id.* at 469; *Second Computer Inquiry—Reconsideration*, 84 F.C.C.2d at 71-75.

⁸⁴ *Second Computer Inquiry—Reconsideration*, 84 F.C.C.2d at 93.

⁸⁵ *Second Computer Inquiry—Affirmance*, 693 F.2d at 211.

⁸⁶ *Second Computer Inquiry—Reconsideration*, 84 F.C.C.2d at 87-91.

⁸⁷ *Id.* at 92.

⁸⁸ See *Western Union Telegraph Co. v. FCC*, 674 F.2d 160, 165-66 (2d Cir. 1982) ("the Commission has broad discretion to choose which regulatory tools to employ . . . and its decision must be upheld unless it is irrational . . ."); see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (Commission's judgment on "how the public interest is best served is entitled to substantial judicial deference."); *Second Computer Inquiry—Affirmance*, 693 F.2d at 214 (Commission's "choice of regulatory tools . . . must be upheld unless arbitrary or capricious."); *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846, 853 (5th Cir. 1971) (Congress created a broad mandate in the Communications Act "to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.").

⁸⁹ *GTE Service Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973).

⁹⁰ *Second Computer Inquiry—Affirmance*, 693 F.2d at 212.

⁹¹ 629 F.2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981).

⁹² 47 U.S.C. § 312(a)(7)(1976) (enacted as the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 103(a)(2)(A), 86 Stat. 3, 4 (1972), amending the Communications Act of 1934).

⁹³ *CBS*, 629 F.2d at 26.

⁹⁴ *Id.*, 453 U.S. at 391 n.14.

⁹⁵ See *supra* note 46.

⁹⁶ 47 U.S.C. § 205(a) (1976).

⁹⁷ Although the Commission does not have direct jurisdiction over a subscriber who interconnects with a communications common carrier or a CPE manufacturer, it can apply § 205 to exercise indirect oversight by regulating the underlying carrier, and through regulation standards, terms, and conditions by which equipment can be attached to a carrier network. See, e.g., *Special Telephone Charges*, 10 F.C.C. 252 (1943) (FCC asserted jurisdiction over hotel surcharge of long distance telephone services because the hotel was deemed an "agent" of the carrier, so they jointly participated in providing interstate communications service to hotel patrons without a filed tariff). Compare *Ambassador, Inc. v. United States*, 325 U.S. 317, 326 (1945) (the Court held it was unnecessary to determine whether the hotel was an agent because, whatever the relationship, it was subject to reasonable FCC regulation under the Commission's power to review and approve the telephone company tariffs). Cf. 47 C.F.R. §§ 68 *et seq.* (1980) (equipment registration rules and regulations); *American Telephone & Telegraph Co.*, 75 F.C.C.2d 682 (1980), *aff'd sub nom. Western Union*, 673 F.2d 539 (D.D.C. 1982) (policy on use of CPE to convert international message telephone service network into a vehicle for data transmission).

⁹⁸ See *supra* note 49.

⁹⁹ See *supra* note 75.

¹⁰⁰ See *supra* note 65.

¹⁰¹ See *International Telecommunication Convention*, Oct. 25, 1973, art. 44, 28 U.S.T.

2497, 2537, T.I.A.S. 8572 at Annex 2. The ITU defines a Recognized Private Operating Agency as follows:

"[a]ny individual or company or corporation, other than a government establishment or agency, which operates a telecommunications installation intended for an international telecommunication service [and] which operates a public correspondence or broadcasting service and upon which the obligations provided for in Article 44 of the Convention ["to abide the provisions of this Convention and the Administrative Regulations . . ."] are imposed by the Member in whose territory the head office of the agency is situated, or by the Member which has authorized this operating agency to establish and operate a telecommunication service on its territory. *Id.*, 28 U.S.T. at 2643.

¹⁰² See *supra* note 58.

¹⁰³ The U.S. Senate Committee on Commerce, Science, and Transportation has recently sought to revamp the U.S. international telecommunications policy formation structure and the underlying objectives governing the process. See International Telecommunication Deregulation Act, S. 2469, 97th Cong., 2d Sess., 128 CONG. REC. 50, 435-43 (1982) (revised and retitled as the International Telecommunications Act, Calendar No. 961, Nov. 20, 1982); see also S. REP. No. 669, 97th Cong., 2d Sess. (1982).

Where feasible, S. 2469 seeks to promote marketplace competition in international telecommunications and information processing. The bill creates an intergovernmental agency task force to consolidate the government's participation in the process. The Senate report endorses the notion that "the FCC should grant private operating agency status to enhanced service providers that request such status." S. REP. No. 669 at 4. The Report also approves of the Commission's procedure for certifying telecommunications equipment, noting that it furnishes a workable mechanism for recognizing and authorizing RPOAs pursuant to art. 44 of the ITU Convention. See 47 C.F.R. § 68 *et seq.*